

Allen v. Barnhart, No. 04-55898

APR 13 2006

TASHIMA, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

The Commissioner's denial of Social Security benefits should be set aside when the ALJ's findings are "based on legal error." Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996). In this case, the ALJ improperly rejected medical findings that Allen was "markedly limited" in several areas related to employment. Because the ALJ's findings were the product of legal error, I would reverse and remand.

Moore v. Commissioner of the Social Security Administration, 278 F.3d 920 (9th Cir. 2002), involved a similar factual situation, in which a claimant sought disability benefits for a "closed period" preceding his return to work. In Moore, the ALJ discounted medical assessments of Moore as disabled, instead relying on evidence of the claimant's eventual return to work as "the most compelling evidence." Id. at 924. We rejected the ALJ's reasoning, however, holding that an applicant's employment cannot serve as a "specific and legitimate" reason for rejecting the opinions of examining physicians that an individual is disabled, unless the employment is "wholly inconsistent" with the claimed disability. Id. at 923, 925.

Despite our clear holding that a claimant's return to work is not a basis for rejecting medical evidence of disability, the ALJ here committed an identical error

in rejecting Dr. Henderson's evaluation that Allen was "markedly limited" in several areas related to employment. The ALJ rejected the limitations contained in Dr. Henderson's report "because they are contrary to the claimant's own behavior, namely engagement in work activity of a skilled nature." In fact, Allen was able to return to work only with the assistance of an unusually accommodating employer who permitted Allen to take frequent and lengthy breaks. Allen's employment was therefore not inconsistent with Dr. Henderson's assessment that Allen was "markedly limited" in her ability to work without excessive rest periods. Moreover, the record clearly indicates that Allen did not begin her employment until after her closed period of disability ended.

In addition to its attempt to distinguish Moore, the majority asserts that the ALJ was permitted to reject Dr. Henderson's medical findings because other examining physicians¹ provided contradictory medical findings. Id. The ALJ, however, "may reject the opinion of a treating physician in favor of a conflicting opinion of an examining physician" only if the ALJ provides "specific, legitimate reasons for doing so." Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002)

¹ In its discussion of reports from doctors "who examined Allen," the majority cites to Dr. Tiedeman's generic conclusion that Allen's disorder did not rise to the level of a "severe" impairment. Maj. dispo. at 4. Dr. Tiedeman, however, was not an examining doctor.

(internal quotation marks omitted). Here, the ALJ's only justification for favoring the other medical evaluations over Dr. Henderson's assessment was Allen's employment, which, as discussed above, is an invalid basis for rejecting a treating physician's findings. The majority's intimation that Dr. Henderson's evaluation can be rejected because it was internally contradictory is incorrect, as none of his findings contradicts his conclusion that Allen was markedly limited in these specific areas.

Accordingly, the ALJ's ultimate finding that Allen's psychiatric limitations are only "mild" in severity is the product of legal error; thus, the Commissioner's denial of benefits should be set aside. See Smolen, 80 F.3d at 1279.

I respectfully dissent.